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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, PETITIONERS

v.

THE UNITED STATES

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

We do not oppose the granting of writs of certiorari in these cases. The petition is based chiefly upon a conflict between the decision below and that

of the Circuit Court of Appeals for the Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, decided June 2, 1938, 97 F. (2d) 31. The Government will file a petition for certiorari in the *Weaver* case on the ground, among others, of a conflict between that decision and the instant cases.

The Court of Claims upheld the Commissioner's determination that the loss sustained by Alexander M. White and the estate of William A. White, upon the distribution of a liquidating dividend of $5 on each share of preferred stock in Del-Bay Farms, Incorporated, could be deducted only as provided in Section 101 (b) of the Revenue Act of 1928, c. 852, 45 Stat. 791, which limits the diminution in income tax to 12½% of capital net loss. Section 101 (c) (2) of the 1928 Act provides that " 'Capital loss' means deductible loss resulting from the sale or exchange of capital assets." The court ruled that this definition in terms of sale or exchange embraces losses resulting from the receipt of liquidating dividends, in view of Section 115 (c) of the 1928 Act, which provides that "Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, * * *"

In the *Weaver* case, the Circuit Court of Appeals for the Ninth Circuit held that losses resulting from the receipt of liquidating dividends are not covered by Secton 23 (r) (1) of the 1932 Act, c. 209, 47 Stat. 169, which provides that "Losses from sales or exchanges of stocks and bonds * * *

which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges * * *." That court declined to interpret Section 23 (r) in the light of Section 115 (c)[1] and stated that the latter section "does not say a liquidating distribution is an 'exchange', but says it 'shall be treated' as such for the purpose of applying §§ 111 and 112." It held the loss deductible as an ordinary loss by virtue of the general provisions relating to the taxability of corporate distributions.[2]

Although the two decisions involve different sections of the revenue laws, we agree that they are in substantial conflict. Both cases turn upon the question whether distributions in liquidation are subject to provisions governing losses resulting from a *sale or exchange* of assets—the *Weaver* case involving stocks held less than two years, and therefore not capital assets, and the present cases involving capital assets. The Court of Claims employed Section 115 (c) in order to determine the coverage of Section 101. The Court of Appeals for the Ninth Circuit apparently held that Section 115 (c) can be applied only in conjunction with Sections 111 and 112, to which it refers,[3] notwithstanding the dissent of Circuit Judge Stephens,

[1] Section 115 (c) of the 1928 Act was retained without change in the 1932 Act.

[2] Sections 22 (d), 112, and 115 (c) of the 1932 Act, in so far as relevant, are reenactments of the same sections of the 1928 Act.

[3] The court also invoked general canons of construction, but these do not seem to constitute the crux of the decision.

who cited the opinion of the Court of Claims in the present cases, and stated that the phrasing of Section 115 (c) "shows an intent to settle for tax purposes the somewhat anomalous character of a liquidation distribution transaction as a sale or exchange of the stock for the amount distributed."

The Revenue Act of 1934, c. 277, 48 Stat. 680, made radical changes in the treatment of capital gains and losses, but Section 115 (c) remains unchanged, in so far as losses resulting from distributions in liquidation are concerned, and the question whether liquidating dividends shall be treated as received upon an exchange within the meaning of sections of the statute other than those mentioned in Section 115 (c) will doubtless continue to arise. In fact, the question whether such a loss is deductible in full or whether it is limited by Sections 23 (j) and 117 (d) of the 1934 Act, which allow losses from the sales or exchanges of capital assets only to the extent of $2,000 plus the gains from such sales or exchanges, is now pending before the Circuit Court of Appeals for the Ninth Circuit in the case of *Martin General Agency* v. *Commissioner,* on appeal from the Board of Tax Appeals, whose memorandum opinion, not reported, was rendered August 19, 1937.

They were not invoked by the court below, in view of its decision on the clear meaning of Sections 101 (c) (2) and 115 (c).

If certiorari is granted, the Government intends to raise the additional defense, which the court below did not find it necessary to consider, in No. 97, brought by the sole surviving executor of the estate of William A. White, to the effect that any refund in excess of $127.64, with interest thereon, of the taxes paid by the estate of William A. White for the year 1929, is barred by the statute of limitations, Section 322 of the Revenue Act of 1928.[4]

It is therefore believed that the question involved merits review by this Court, and we, accordingly, do not oppose the petition for writs of certiorari.

Respectfully submitted.

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AUGUST 1938.

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[4] The last installment of the tax for the year 1929 shown as due on the income tax return of the estate of William A. White was paid on December 15, 1930, in the amount of $885.28. On December 31, 1931, $757.64 and interest was refunded to the estate by the Commissioner of Internal Revenue. Claim for refund for $446.06, the amount sought to be refunded in this suit, was filed on December 15, 1932. This claim was timely only as to the last installment of the tax. Since $757.64 of this installment had already been refunded, only $127.64 can be recovered in the event the Court should decide that the petitioner in No. 97 is entitled to recover. *Blair* v. *Birkenstock*, 271 U. S. 348.

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